STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court No. 156430**

KELLI MARIE WORTH-McBRIDE,

Defendant-Appellant.

Court of Appeals No. 331602
Trial Court No. 13-000575-02-FC

The People's Brief in Opposition to Defendant's Application for Leave to Appeal with Appendices A and B

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Table of Contents

Index of Authorities

Cases

Michigan

Federal

Other States

Michigan Court Rules

Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

Counterstatement of Question Involved

A parent who fails to prevent harm to his or her child, knowing that serious physical harm will be inflicted on the child, is guilty of first-degree child abuse as a principal; likewise, a parent who fails to protect a child by leaving the child in the abusive hands of another person, be it the other parent or not, with willful disregard of the natural tendency of the abuser to cause the child great bodily harm, where the child's death results, is guilty of second-degree murder as a principal. Having witnessed the father throwing their baby down and giving the baby "bear hugs," which entailed the father folding the baby in half, and the baby having sustained numerous broken bones and other injuries, which would have doubtlessly led to some kind of outward expression of pain by him, Defendant knew that leaving or allowing the baby to be in the abusive hands of the father would cause the baby serious physical harm and was likely to cause him great bodily harm. Did the trial court properly find Defendant guilty as a principal of first-degree child abuse and second-degree murder?

The People answer yes.
Defendant answers no.
The trial court answered yes.

Counterstatement of Facts

Defendant, Kelli Worth-McBride, along with her live-in boyfriend, Joshua Wilson, who was also the father of her child, Joshua Wilson, Jr., was charged with Count I:first-degree felony murder, with the underlying offense being first-degree child abuse, in violation of MCL 750.316, and Count II: first-degree child abuse, in violation of MCL 750.136b(2).

The matter was tried in a bench (waiver) trial with the Honorable Qiana D. Lillard sitting as the trier of fact.

The testimony at both the preliminary examination and Defendant's waiver trial included the following:

Preliminary Examination

Washtenaw County Forensic Pathologist Jeffrey Jentzen

Washtenaw County Forensic Pathologist Jeffrey Jentzen testified that he conducted the autopsy on the body of Joshua Wilson, Jr., whose date of birth was September 16, 2012, making the child three (3) months old at the time of his death (Preliminary Examination Transcript, 8).

His external examination revealed multiple contusions or bruises on the child's body, essentially throughout the entire body surface, but specifically in the mid-chest area known as the sternum (9). The bruising to this area, that is the mid-sternum area, had to have been caused by a large amount of force either with a blow with a hand or a clenched fist, or multiple discreet blows (10).

Over the heart area was a pattern of large bruises which encompassed an area two inches by two inches (9). There was another bruise just to the right of the midline of the abdomen, and a bruise over the pubic bone on the front of the body (9).

In the area of the ribs on the right side of the body, there was a pattern of four distinct alternating bruises, which extended down the right side (9). There was a similar pattern of bruises on the left side (9). These bruises were consistent with adult hands around the chest area (11). The baby could not have done this to himself (11).

On the right lower abdomen was a complex pattern of multiple distinct bruises, around five in number (9-10).

On the back was a pattern of bruising that was concentrated over the midline portion of the spine (10). It was his opinion that this bruising was either caused by direct blows to the back or by secondary blows to the front of the body that impacted the back portion of the body, such as if the baby had his back to a hard surface and he sustained a blow or blows to the front of the body (20).

Over both knees was a complex pattern of multiple bruises that were distinct and overlying the knee cap areas of both knees (10).

There were two bruises on the face area (19). One was just above and in front of the left ear, and one on the right jawbone (19).

All in all, there were six areas where there was multiple bruising (19), and he counted roughly 30 separate bruises, meaning that the baby was struck multiple times (19-20). His opinion was that all of the bruises were intentionally inflicted injuries (12).

The baby's entire body was x-rayed (12). The x-rays showed recent and healing fractures (13). There were fractures of both the right and the left clavicles or collarbones (13), that were in

the process of healing (14). There were recent fractures of the ribs: ribs 3 though 10 on the right side, healing fractures of rib 12 on the right and the left, and a healing fracture of rib 7 on the left side (13). He could tell that certain ribs were in the healing process from the presence of callus formations, which showed up prominently on x-ray (13-14). The ribs that were in the healing process were at least two weeks old (14). The rib fractures were classic abusive injuries, and they were consistent with an adult squeezing the child's ribs (15).

Also from the x-rays, he learned that there was a fracture to the right radius, which was the area over the outside of the right wrist, which was in the process of healing (16). There were also fractures to the right and left bones in the lower legs, called the tibia (16). These were also in the process of healing (16). These were what were called metaphyseal (sic) fractures, where the bones were sheared off of the growth plate (16). Such injury was caused by a twisting or torque injury in a child (16).

His internal examination of the baby started with the opening of the abdominal cavity (17). In the abdominal cavity, he found a large amount of recent blood that was both clotted and liquid (17). What had caused the bleeding was a laceration or tear of the mesentery of the small intestine (17). The mesentery was what connected the intestine with the aorta, and contained all of the blood vessels that would supply nutrients to the intestines (17). The laceration was three and a half to four inches in length, and was caused by blunt force trauma (17). It would have taken a large amount of force to lacerate the baby's mesentery (18).

There was also a laceration of the spleen, which was located in the upper portion of the abdomen, just below the rib cage (17). It would have taken a large amount of force to lacerate the baby's spleen as well (18).

He also found swelling of the brain, which was consistent with lack of oxygen to the brain, causing brain cell death (18-19). The baby's lack of oxygen was due to the hemorrhagic shock from the excessive bleeding from the lacerations to the mesentery and spleen (19). The hemorrhagic shock from the excessive bleeding from the lacerations to the mesentery and spleen was what caused the baby's death (21). He classified the manner of death as homicide (21).

On examination by Defendant's counsel, the witness reiterated that the fractures that were in the process of healing had occurred at least two weeks prior to the baby's death (22-23). These were all of the rib fractures on the right side and two ribs, rib 7 and rib 12, on the left side (23). The other rib fractures, the ones next to the spine, occurred contemporaneously to the time of death (23).

All of the bruising that he saw on the child's body was contemporaneous to the time of death, or occurred shortly before death (24).

The witness reiterated that the cause of death was hemorrhagic shock due to the excessive bleeding from the spleen and mesentery, caused by a large amount of blunt force to the front of the abdomen (26).[1]

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[1] The preliminary examination transcript was incorporated by reference into the record at trial:

> THE COURT: Okay. So we should incorporate by reference into the record the preliminary exam transcript because I will review that in order to make my findings of fact and conclusion.
>
> (Waiver Trial Transcript, 04/30/14, 42).

Waiver Trial (April 30, 2014)

Westland Police Sergeant David Dinsmore

Westland Police Sergeant David Dinsmore testified that on December 19, 2012, the Police Department was notified of a baby who was brought into Annapolis Hospital not breathing (Waiver Trial Transcript, 04/30/14, 9; 16). He and Sergeant Dolly were assigned to follow up on that (9).

When they got to the hospital, they encountered Defendant, who he identified in court (9). At the hospital, Defendant wrote out a statement in her own handwriting, which he identified as People's Exhibit No. 3 (10). They (he and Sgt. Dolly) did not know at the time that a crime had even been committed (11). The statement that Defendant handwrote read as follows:

> All that I knew was when I was home he was fine with Junior plus I was at the soup kitchen and when I came back he was not moving whatsoever. My friend called 911 and the police came, but before the police came my friends helped us to get him to breathe. Josh gave him a bath trying to cool him down and feeding him.
>
> (11).

After Defendant wrote this statement out, he and Sgt. Dolly talked to the doctor at the hospital, as well as the paramedics who responded to Defendant's address (12). What they learned was that there were injuries to the child that were in different stages of healing (12). Photographs were taken of the child's body (12-13). He identified People's Exhibits 5 through 17 as the photos (13). The photos showed bruising all over the child's body (13).

After speaking to another person who had been at the scene, the scene being Defendant's home, 2064 South Venoy, he had reason to believe that Defendant had not been honest with them in her handwritten statement (15-16). Defendant was placed under arrest and taken to the Westland

police station by another officer (15). At the police station, he and Sgt. Dolly took Defendant from her cell to an interview room within the police station (16).

After Defendant was advised of her Miranda rights, and indicated that she understood them, by Defendant reading the rights out loud, initialing each right, and signing and dating the Advice of Rights form (16-18), Defendant indicated that she wanted to make a statement (18).

Initially, Defendant stuck to her story about not being home (19). At some point, she changed her story (19). How that happened was that Defendant was smiling and not appearing to take the situation seriously, which prompted him to yell at her, and tell her that her baby was dead (19). He also showed her pictures of the baby (19). At that, Defendant broke down and cried (19). She then said that she had come home much earlier than she had originally said, and when she walked in, the baby's father, Josh Wilson, Sr., who was also her live-in boyfriend, was punching the baby (19-20). She saw him punch the baby four or five times (19-21). When she saw this, she yelled at the father to stop and ran towards him (20).

They asked Defendant about the baby's different stages of healing (21). Defendant told them that she had seen the father throw the baby down (21). She said that she had seen this four times (21). Defendant also said that when the baby would fuss or cry, the father would bear-hug the baby to get him to stop (22). He asked her to demonstrate how the father would do this, and he gave her a teddy bear to demonstrate (22). Defendant folded the teddy bear in two and said that that was what the father would do to get the baby to stop crying (22). Defendant said that she had witnessed this three times in the past (22). Defendant said that she had seen the father do this just that morning (23). She did not recall the dates when she had seen him do this before (23).

After Defendant gave them this preliminary information, he and Sgt. Dolly prepared a statement where they wrote out questions and Defendant wrote out her answers (23). She then placed her initials next to each answer and signed the statement (23-24). It went as follows:

Q Did Josh know you observed him punching Junior in the chest?

A No, he had no idea.

Q What did you do and say when you observed Josh punching Junior in the chest?

A I yelled at him and demanded him to stop.

Q Did you take Junior from Josh?

A Yes.

Q Was Junior's body limp?

A Yes, he was limp.

Q How many times in the past did you see Josh bear-hug Junior to get him to stop crying?

A Three times.

Q How long ago did Josh throw Junior down?

A At 10:30 a.m. this morning. A few months ago.

Q How long ago did you see Josh give Junior a bear-hug?

A Yesterday and four different times. Don't remember.

Q When you saw the squeezing and throwing of Junior what did you do?

A I told Josh to stop.

Q Are you drunk, high, or on meds?

A No.

Q Did we threaten you or promise you anything?

A You made me cry, and no, you did not hurt me.

Q Are these statements the truth?

A Yes.

(24-25).

During his conversation with Defendant, he did ask her why she did not get the baby away from the father (25). She responded that she did not know (25). She did say that she got a government check, and that all that the father did was play video games, and she did not need him (25).

Waiver Trial Continued (May 2, 2014)

Trial Court's Findings of Fact and Verdict

> THE COURT: All right. It took me a minute. One more thing I have to do. The Defendant, Kelli Marie Worth McBride, has come before this Court charged as defendant number two in the Information with count one, homicide felony murder, and count two, child abuse first degree. The prosecution contends that the Defendant, Kelli Marie Worth McBride, is guilty of felony murder because she failed to protect her three month old son from ongoing abuse at the hands of her boyfriend, Joshua Davis Wilson.
>
> In support of its position, the People argue two unpublished Michigan Court of Appeals cases, *People v Ware* and *People v Boram*. The Defense contends that the Defendant did not fail to protect her child because she had no knowledge that the actions of Joshua Davis Wilson were sufficient to cause serious physical harm to the child. Additionally, the Defense argues that on several

occasions the Defendant told Joshua Davis to stop hitting or harming the child.

This matter having come before the Court for a waiver trial, upon hearing testimony of one witness and reviewing the admitted exhibits and preliminary exam transcript, the Court hereby makes the following finding of fact and conclusions of law:

Findings of fact: The Defendant, Kelli Worth McBride, lived at 2064 South Venoy in the city of Westland, County of Wayne. She shared this home with her live-in boyfriend, Joshua Davis Wilson, and their three month old son, Joshua Wilson Jr. Emergency medical personnel and police responded to the Westland home after a 911 call placed by the Defendant on December 19, 2012. At this time the child was found to be unresponsive and limp. The child was taken to Oakwood Annapolis Hospital and later air lifted to Mott Children's Hospital in Ann Arbor. Joshua Wilson Jr. was pronounced dead on December 19, 2012 by Dr. Michelle Carney of Mott Children's Hospital. He was admitted to the hospital from a – wait. Sorry. Through interviews of Defendant, Kelli Worth McBride, Michael Alond (sp) and Joshua Wilson, the Westland Police Department determined that on December 18, 2012 Joshua Wilson became angry with the child for interfering with his video game time and started slapping the child.

Further on December 19th, he slapped him and punched Joshua Jr. when he was crying then threw him at a car seat. He additionally folded the baby over by the waist and tried to squeeze or bear hug him to stop his crying. Initially, both Joshua Wilson and the Defendant lied to the police and told them that she had been out of the house while the majority of the abuse on December 19th was occurring and when she came back home she saw the defendant [Joshua Wilson, Sr.] strike the child and told him to stop. It is not until the Defendant is confronted by Sergeant Dinsmore during a subsequent interview that she admits to being present when Joshua Jr. was being beaten by his father both on December 18th and 19th.

According to the testimony and the exhibits introduced during the trial, the Defendant admitted to seeing the father, her boyfriend, punch the baby in the chest and demanded him to stop. She further admitted to police that she had previously seen Joshua Jr. thrown down by his father on four separate occasions; that she saw him, saw Joshua Sr., bear hug the baby to stop him from crying on three

separate occasions a total of five times. Additionally she admitted to previously throwing the child down herself.

The evidence indicates that when the Defendant witnessed these instances of abuse, she would tell the father to stop. The medical records reflect that the child had injuries in various states of healing. Per the skeletal survey there was a sub-acute minimally displaced fracture of the disto right clavicle and posterior right tenth rib. The autopsy demonstrated multiple abusive traumatic injuries including a laceration of the small bowel, mesentery, spelled M-E-S-E-N-T-E-R-E-Y, and spleen with a resulting hemopertonium, which is spelled H-E-M-O-P-E-R-I-T-O-N-E-U-M. There were multiple contusions of the sternum, posterior thorax, right lateral chest and abdomen, left lateral chest and abdomen, right lateral mandible, face, and right and left knees. There was a cerebral anoxia with durent hemmorage, a microscopic anoxic change to the cerebral herniation and bilateral retinal hemmorage and optic nerve hemmorage. There were multiple remote fractures to the tenth rib, pivertal ribs five, six, seven, eight and ten, disto right radius, distal femur and proximal tibia, left distal femur and proximal tibia and the clavicles. There was an acute fracture to the seventh rib. The cause of the child's death was certified as hemorrhagic, spelled H-E-M-O-R-R-H-A-G-I-C, shock due to laceration of the mesentery spleen due to blunt forced trauma. The manner of death was determined to be homicide.

I would also indicate, for the record, that there were a lot of pictures that were introduced into evidence that showed the seriousness and the severity of the injuries that were all over this child's body. His body was basically covered with bruises on the front, the back, his head. There is blood coming from his mouth. I mean there's no question that this child was very, very physically abused in his short life.

Findings of law: Count two, child abuse in the first degree is charged as the predicate felony for count one, homicide felony murder. Therefore in making its findings of law, the Court must first address count two.

The Defendant is charged with child abuse first degree under MCL 750.316(1)(b). When construing a statute, a court must give effect to the intent of the legislature by construing the language of the statute itself. Where the language is unambiguous, the court must

give the words their plain meaning and apply the statute as written. The plain language of the statute requires that to be convicted of first degree child abuse, a person must knowingly or intentionally cause serious physical harm or serious mental harm to a child. The phrase knowingly or intentionally modifies the phrase, "causes serious physical injury or serious mental harm to a child," thus this language requires more from the defendant than an intent to commit an act.

The prosecution must prove that the Defendant intended to cause serious physical or mental harm to the child or that she knew that serious mental or physical harm would be caused by, in this case, leaving the child with his father or allowing the child to remain in the presence of his father.

In the case cited by the prosecution, *People v Borum,* the Court held that applying the plain language of the statute – the failure to prevent a person who may be dangerous to a child from having contact with the child cannot constitute knowingly or intentionally causing serious harm. If a parent only knows that a person may be dangerous, then by leaving the child with that person the parent does not intend to cause serious harm or know that serious harm will result as required to establish first degree child abuse and, in that ruling, the Court relied upon *People v Maynor,* 470 Mich 289, a 2004 case.

In order to knowingly and intentionally cause serious harm a parent must know that a person will cause serious harm to the child. Although this Court does not dispute that there is a common law duty of a parent to protect a child, the real question turns upon whether or not the Defendant here had knowledge that serious physical harm would result to the child if she continued to allow Joshua Wilson to have access to their baby despite her awareness that he was abusing the child. I think given the nature of these injuries that were all over this child's body, the fact that this child had injuries that were in various states of healing, I don't think there's any question that she had to know that serious harm could result to her child if she continued to allow him to be in the presence or left in the care of a man who she had witnessed on multiple occasions folding a baby in half like a, as she demonstrated to the officer, with a teddy bear and squeezing him until he stopped crying. It was clear from the testimony that was presented on this record and the exhibits admitted that this was his practice; that when the baby would cry he would fold him in half and bear hug him until he stopped crying. Anyone

knows that a normal three month old baby is going to cry. When you think about a child that had bruises all over his body and was probably in excruciating pain that makes the likelihood that he was going to cry even greater and that he would be subjected to the practice of bear hugging that the defendant had previously witnessed, and I think under those circumstances there is sufficient evidence to find the defendant guilty of child abuse in the first degree, and that is my finding at this time.

However, as it relates to murder in the first degree, or felony murder, the Court would have to find in order to find the Defendant guilty of felony murder I think – I think that's really where the issue is. In order to find the defendant guilty of felony murder, I would have to first find that the Defendant caused the death of the child and that the Defendant had one of three states of mind: That she intended to kill her child; that she intended to do great bodily harm to her child or that she knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of her actions. Third, that when she did the act that caused the death, and in this case, that would be leaving her child in the care or in the presence of his father, that she was committing or attempting to commit, or helping someone else to commit, the underlying crime, I guess, which would be child abuse in the first degree. And fourth, that the killing was not justified, excused or done under circumstances that would reduce it to a lesser crime.

THE COURT: I think in this instance it can't be said that when she left her child with her father, with his father that she knew that she did it with her intent for her child to be killed. There is no evidence on this record to support that she left that baby with his father with the intent that he'd be killed. There's also no evidence on this record that she left the child with the intent that great bodily harm would result to him. The bigger question is whether she knowingly created a very high risk of death or that great bodily harm knowing that such harm would likely be the result of leaving her child with her father – with his father? Clearly, I don't think that she did this, that she left the child with the father, in order to assist him in committing child abuse, and I do think that she had some knowledge that he was abusing the child, but I think when you look at the facts and circumstances of the case that, if I was a jury, I would have instructed the jury that they should also consider the lesser charge of second degree murder.

To prove that charge, the prosecution would have to prove beyond a reasonable doubt, first, that the defendant caused the death of the child. Second, that the child died as a result of the act, which would be leaving the child alone with a man who she knew was abusing him.

Second, that the defendant had one of these three states of mind: That she either intended to killed her child; that she intended to do great bodily harm to her child or she knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result; and third, that the killing was not justified, excused or done under circumstances to reduce it to a lesser crime.

So when they talk about the common law duty of a parent to protect a child from abuse, they talk about, in some of the cases that looked at this legal issue, they talk about the fact that the common law duty of a parent to protect a child, and let me find it. Let me pull it right up so I can be accurate. That the common law duty of a parent to prevent injury to his or her child is not limited to when the parent is aware of immediate danger to the child but they specifically said, and I'm looking at *People v Borum,* the same case that the People relied upon in its argument. The Court in *Borum* citing to *People v Birdsly* (sic) [*People v Beardsley*], 150 Mich 206, a 1907 case, says that the law recognizes that under some circumstances the omission of a duty owed by one individual to another where such omission results in the death of one to whom duty is owning will make the other chargeable with manslaughter. This rule of law is always based upon the proposition that the duty neglected must be a legal duty and not a mere moral obligation. It must be a duty imposed by law or by contract and the omission to perform the duty must be the immediate and direct cause of death. Although the literature upon which the subject is quite meager and the cases are few, nevertheless, the authorities are in harmony as to the relationship which must exist between the parties to create the duty the omission of which establishes legal responsibility.

One authority has briefly correctly stated the rule which the Prosecution claims should be applied to the case at bar as follows: If a person who sustains to another the legal relation of protector as husband to wife, parent to child, master to seaman, knowing such person to be in peril willfully and negligently fails to make such reasonable and proper efforts to rescue him as he might have done

without jeopardizing his own life, or the lives of others, he is guilty of manslaughter at least if by reason of his omission or duty the dependant person dies, so one who from domestic relationship, public duty, voluntary choice, or otherwise has the custody and care of a human being helpless either from imprisonment, infancy, sickness, age and imbecility or other incapacity of mind or body is bound to execute the charge with proper diligence and will be held guilty of manslaughter if by culpable negligence he let the helpless creature die.

Accordingly, there is a common law duty of a parent to prevent his or her child – prevent harm to his or her child. The Michigan Supreme Court states that the breech of the duty must be the immediate and direct cause of the death in order for the parent to be liable for manslaughter. However, there's no indication that the parent need only protect his or her child from immediate injury.

This Court found that the defendant, the parents of the child victim, had a legal duty to their child and they're there to provide nourishment for the child, thus the duty is not limited to immediate danger. So in thinking about whether or not, in this case, the Defendant should be found guilty of felony murder, murder in the second degree, or manslaughter, you know, it was really difficult for me, and I had to think about whether or not she was simply negligent, or whether or not she knowingly created a very high risk of death or great bodily harm to the child? And I think in this case, even though the common law duty or the case law interpreting a common law duty talks about manslaughter, I think the difference in this case which is why I don't think it's manslaughter is because she was more than just negligent. I think her actions showed a wanton and willful disregard of the natural tendency of the conduct that she knew was going on would result in that child being harmed and so, for those reasons, I think that under the facts and circumstances of this case I find the Defendant not guilty of count one, felony murder, but I find her guilty of the lesser offense of second degree murder. We need to make sentencing dates.

(Waiver Trial Transcript, 05/02/14, 3-16).

Argument

A parent who fails to prevent harm to his or her child, knowing that serious physical harm will be inflicted on the child, is guilty of first-degree child abuse as a principal; likewise, a parent who fails to protect a child by leaving the child in the abusive hands of another person, be it the other parent or not, with willful disregard of the natural tendency of the abuser to cause the child great bodily harm, where the child's death results, is guilty of second-degree murder as a principal. Having witnessed the father throwing their baby down and giving the baby "bear hugs," which entailed the father folding the baby in half, and the baby having sustained numerous broken bones and other injuries, which would have doubtlessly led to some kind of outward expression of pain by him, Defendant knew that leaving or allowing the baby to be in the abusive hands of the father would cause the baby serious physical harm and was likely to cause him great bodily harm. The trial court properly found Defendant guilty as a principal of first-degree child abuse and second-degree murder.

A) Defendant's Claim

Defendant's sole claim is that the evidence was insufficient to support her convictions of first-degree child abuse and second-degree murder.

B) Counterstatement of Standard of Review

Review of a challenge to the sufficiency of the evidence in a bench trial is de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman–Huffman,* 241 Mich App 264, 265; 615 NW2d 776 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the ... verdict." *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000).

C) The People's Position

The prosecution's theory of Defendant's culpability, as to both first-degree child abuse and first-degree felony murder, was as an aider and abettor. The trial court, in its Order Denying Defendant's Motion for New Trial/Motion to Vacate Convictions and Sentences, stated that it found Defendant guilty of first-degree child abuse and second-degree murder not as an aider and abettor, but as a principal. The evidence was sufficient to find Defendant guilty under both theories (as a principal and as an aider and abettor) of both first-degree chid abuse and second-degree murder.

i) First-degree child abuse

a) Defendant's culpability as a principal

Acknowledging that unpublished opinions of the Court of Appeals are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), the People nevertheless ask this Court to consider the case cited by both the prosecution and the trial court, that being *People v Borom,* unpublished opinion per curiam of the Court of Appeals, decided December 19, 2013 (Docket No. 313750) (a copy of this Opinion is attached as **Appendix A**).[2]

In *Borom* (**Appendix A**), pp 3-4, the Court opined that first-degree child abuse did not require an affirmative act, although an affirmative act would suffice, but could be committed by omission. "However, in order to be guilty of first-degree child abuse by committing an omission, such as failing to prevent harm to a child, the defendant must have intended to cause serious physical harm or have known that serious physical harm to the child would be caused." (**Appendix A**), p 3. As the People read *Borom*, and as the trial court obviously read it, a parent who fails to prevent

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[2] The People are citing this case pursuant to MCR 7.215 (C)(1) for the reason that it explains succinctly the law relative to what is needed to convict of first-degree child abuse as no published case that the People have found does.

harm to a child, knowing that serious physical harm to the child would be caused, is culpable of first-degree child abuse as a principal.[3]

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[3] See also *Illinois v Stanciel,* 153 Ill 2d 218, 236; 180 Ill Dec 124, 134; 606 NE2d 1201, 1211 (1992):

> Although the law does not generally require an individual to come to the aid of another, certain relationships exist which require such action. Criminal conduct may arise not only by overt acts, but by an omission to act where there is a legal duty to do so. LaFave and Scott address this duty in their treatise on criminal law:
>
> "Some statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of conduct producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act, and (2) he can physically perform the act. The trend of the law has been toward enlarging the scope of duty to act." W. LaFave & A. Scott, Criminal Law § 26, at 182 (1972).

And see *Wisconsin v Williquette,* 129 Wis 2d 239; 385 NW2d 145 (1986):

> In this case, Bert Williquette's conduct obviously was a direct cause of the abuse his children suffered. However, the defendant's alleged conduct, as the mother of the children, also was a contributing cause of risk to the children. She allegedly knew that the father abused the children in her absence, but she continued to leave the children and to entrust them to his exclusive care, and she allegedly did nothing else to prevent the abuse, such as notifying proper authorities or providing alternative child care in her absence. We conclude that the defendant's conduct, as alleged, constituted a substantial factor which increased the risk of further abuse.
>
> * * * *
>
> The defendant disputes that an omission to act may constitute a crime. Although the court disagrees with this argument, we specifically note that the alleged conduct in this case involves more than an omission to act. The defendant regularly

left the children in the father's exclusive care and control despite allegedly knowing that he abused the children in her absence. We consider leaving the children in these circumstances to be overt conduct. Therefore, even assuming that an overt act is necessary for the commission of a crime, the allegations support the charges in this case.

The court, however, also expressly rejects the defendant's claim that an act of commission, rather than omission, is a necessary element of a crime. The essence of criminal conduct is the requirement of a wrongful "act." LaFave and Scott, Criminal Law, sec. 25 at 177 (West 1972). This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act.

129 Wis 2d at 250-251; 385 NW2d at 150.

* * * *

The requirement of an overt act, therefore, is not inherently necessary for criminal liability. Criminal liability depends on conduct which is a substantial factor in producing consequences. Omissions are as capable of producing consequences as overt acts. Thus, the common law rule that there is no general duty to protect limits criminal liability where it would otherwise exist. The special relationship exception to the "no duty to act" rule represents a choice to retain liability for some omissions, which are considered morally unacceptable.

129 Wis 2d at 253; 385 NW2d at 151.

* * * *

. . . . we conclude that a parent who fails to take any action to stop instances of child abuse can be prosecuted as a principal for exposing the child to the abuse . . . .

129 Wis 2d at 256; 385 NW2d at 152.

While omission to act thus constitutes a crime, the People submit that this case involved more than an omission to act. In this case, Defendant allowed the father to handle the child in the rough manner in which he did when she was in the presence of the father and the child, but she also had to have known that this was how the father would handle the child in her absence. See again the following language from *Wisconsin v Wiliquette*:

> The defendant disputes that an omission to act may constitute a crime. Although the court disagrees with this argument, we specifically note that the alleged conduct in this case involves more than an omission to act. The defendant regularly left the children in the father's exclusive care and control despite allegedly knowing that he abused the children in her absence. We consider leaving the children in these circumstances to be overt conduct. Therefore, even assuming that an overt act is necessary for the commission of a crime, the allegations support the charges in this case.
>
> 129 Wis 2d at 250; 385 NW2d at 150

In any event, it is quite clear that Defendant failed to prevent harm to her child. While it is true that she told Sergeants Dinsmore and Dolly that when she saw the father of the child, her live-in boyfriend, punching the child in the chest on the date of the child's death, she told the father to stop, and she took the child from him, and while it is also true that she told these same two sergeants that when she had seen the father give the child a bear-hug, which meant folding the child in half, in the past, and also throwing the child down, she told him to stop then as well, this does not absolve Defendant of fault or guilt. Apparently, simply telling the father to stop was not effective in getting

him to stop the way he was treating the child. Obviously, more was required. But when asked why she did not just get the baby away from the father, she responded that she did not know. She explained that she herself got a government check, and all that the father did all day was play video games, so it was not as if she needed him. Significantly, Defendant did not say that she just did not know what to do. She knew what she could have done: boot the father out or find her own place. Or she could have done what the Court in *Williquette, supra*, 129 Wis 2d at 250; 385 NW2d at 150, observed the mother in that case should have done: notify the proper authorities or provide alternative care in her absence.

As the trial court noted in rendering its verdict in this case, to find Defendant guilty of first-degree child abuse, the court would have to find that Defendant knew that the person with whom she entrusted or left the child with would cause serious harm to the child.[4]

The evidence was certainly sufficient to support such a finding. As the trial court observed, there was "no question that this child was very, very physically abused in his short life." In fact, just given the number of broken bones that this baby had, two broken legs, two broken collar bones, one broken wrist, and a number of broken ribs, with all of these fractures being in the process of healing, meaning that they were at least two weeks old, this baby must have been in excruciating pain at many points of his three-month old life. And it is simply inconceivable that the baby would

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[4] "The prosecution must prove that the Defendant intended to cause serious physical or mental harm to the child or that she knew that serious mental or physical harm would be caused by, in this case, leaving the child with his father or allowing the child to remain in the presence of his father."

(Waiver Trial Transcript, 05/02/14, 9).

not exhibit this in some form, and that his own mother would not pick up on it. Since it is unlikely that the baby would have inflicted these injuries on himself, Defendant, as the mother, would have had to have known that somebody was doing it. And since she had seen, according to as much as she would admit, her live-in boyfriend, the father, handling the baby extremely roughly and inappropriately, she would have known that he was the one responsible. She must have thought that there was something wrong with how he was handling the child because she, according to her statement, would tell him to stop. And as the trial court noted, what set the father off was the child crying, and, being in excruciating pain, the child would have cried even more, thus subjecting him even more to the father's ire of having his video game so rudely interrupted.

Defendant contends that there was no evidence that she would have known that what she had witnessed the father doing before, bear-hugging the baby and throwing the baby down, would cause serious harm. The People submit again that just based on the numerous fractures that this baby had, it is inconceivable that the baby would not have been in excruciating pain at a number of times in his short life, and that there would have been no exhibition of this by him. In other words, Defendant must have known something terribly wrong was happening to the baby, and that the father was the source.

The People are cognizant that in rendering its verdict as to the first-degree child abuse charge, the trial court stated:

> [THE COURT]: I think given the nature of these injuries that were all over this child's body, the fact that this child had injuries that were in various states of healing, I don't think there's any question that she had to know that serious harm *could* result to her child if she continued to allow him to be in the presence or left in the care of a man who she had witnessed on multiple occasions folding a baby in

> half like a, as she demonstrated to the officer, with a teddy bear and squeezing him until he stopped crying.
>
> (Waiver Trial Transcript, 05/02/14, p 10). (Italic added).

The People are aware that in *Borom (***Appendix A***),* p 5, the Court stated that the failure to prevent a person who *may* be dangerous to the child to have contact with the child did not violate the first-degree child abuse statute; rather, a parent must know that the person *will* cause serious harm. The People acknowledge that the trial court's use of the word "could" in the excerpt set forth above suggests that the trial court was not finding that Defendant knew that leaving the baby with his father *would* result in serious harm to the baby. The fact is, however, that just before the trial court said, "I don't think there's any question that she had to know that serious harm could result to her child," the court had engaged in a lengthy discussion, citing excerpts from *Borom, supra*, illustrating that the court knew what the prosecution had to prove to convict Defendant of first-degree child abuse, and also knew what would not be sufficient to convict of first-degree child abuse:

> [THE COURT]: The prosecution must prove that the Defendant intended to cause serious physical or mental harm to the child *or that she knew that serious mental or physical harm would be caused by, in this case, leaving the child with his father or allowing the child to remain in the presence of his father.*
>
> In the case cited by the prosecution, *People v Borum,* the Court held that applying the plain language of the statute – the failure to prevent a person who may be dangerous to a child from having contact with the child cannot constitute knowingly or intentionally causing serious harm. *If a parent only knows that a person may be dangerous, then by leaving the child with that person the parent does not intend to cause serious harm or know that serious harm will result as required to establish first degree child abuse* and, in that ruling, the Court relied upon *People v Mainor,* 470 Mich 289, a 2004 case.

> *In order to knowingly and intentionally cause serous harm a parent must know that a person will cause serious harm to the child. Although this Court does not dispute that there is a common law duty of a parent to protect a child, the real question turns upon whether or not the Defendant here had knowledge that serious physical harm would result to the child if she continued to allow Joshua Wilson to have access to their baby despite her awareness that he was abusing the child.*
>
> (Waiver Trial Transcript, 05/02/14, 9-10). (Italics added).

After engaging in this discussion, which illustrated that the trial court knew full well that in order to convict Defendant of first-degree child abuse, the court had to find that Defendant knew that serious harm *would* befall her child if she left him in the custody of the father, the trial court did find Defendant guilty of first-degree child abuse. The People submit, then, that the trial court's saying that Defendant knew that serious harm *could* befall the child was nothing more than a misstatement.

b) Defendant's culpability as an aider and abettor

It would not matter if the trial court's theory of Defendant's guilt as a principal turns out to have been erroneous,[5] because '[a] person who aids and abets is guilty as a principal," in any event. *People v Mann,* 395 Mich 472, 477; 236 NW2d 509 (1975).

"[I]n order to prove aiding and abetting first-degree child abuse, the prosecution must prove that (1) first-degree child abuse was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of first-degree child abuse; and (3) the defendant intended the commission of first-degree child abuse or had knowledge that the principal intended the commission of first-degree child abuse at the time the defendant gave

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[5] The People maintain that the language employed by this Court in *Borom* supports the trial court's finding of guilt as a principal.

aid or encouragement. The second and third elements are satisfied if the defendant breaches his or her duty to prevent harm to the child by leaving the child with a person with knowledge that the person intends to commit first-degree child abuse. By leaving the child with the person, the defendant assists in the commission of the crime. If the defendant also intends or has knowledge that the person intends to commit first-degree child abuse, then the elements of aiding and abetting first-degree child abuse are satisfied." *Borom* (**Appendix A**), pp 6-7). "A parent's failure to prevent injury to his or her child, with knowledge that serious harm will result . . . . constitutes aiding and abetting first-degree child abuse." *Borom* (**Appendix A**), p 7, fn 3.[6]

What the trial court noted in rendering its verdict in this case, to find Defendant guilty as a principal, would certainly apply to her guilt as an aider and abettor of first-degree child abuse.

Again, the trial court observed, there was "no question that this child was very, very physically abused in his short life." In fact, just given the number of broken bones that this baby

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[6] See also *Wisconsin v Williquette,* 125 Wis 2d 86; 370 NW2d 282 (1985), *aff'd* 129 Wis 2d 239; 385 NW2d 145 (1986):

> Here, Williquette allegedly knew her husband repeatedly abused their children, yet she did nothing to prevent future occurrences. If she had been present at the time of the abuse, therefore, the state could prosecute her for aiding and abetting. Her knowing failure to intervene would reasonably indicate an intent to assist the perpetrator. Similarly, Williquette allowed the abuse to continue when she failed to intervene, despite knowledge of a pattern of abuse in her absence. Inaction in this situation supports an inference of an intent to assist the crime. Although other reasonable inferences also may be drawn, choosing between conflicting inferences is a matter for the trier of fact.
>
> 125 Wis 2d at 91; 370 NW2d at 285.

had, two broken legs, two broken collar bones, one broken wrist, and a number of broken ribs, with all of these fractures being in the process of healing, meaning that they were at least two weeks old, this baby must have been in excruciating pain at many points of his three-month old life. And it is simply inconceivable that the baby would not exhibit this in some form, and that his own mother would not pick up on it. Since it is unlikely that the baby would have inflicted these injuries on himself, Defendant, as the mother, would have had to have known that somebody was doing it. And since she had seen, according to as much as she would admit, her live-in boyfriend, the father, handling the baby extremely roughly and inappropriately, she would have known that he was the one responsible. She must have thought that there was something wrong with how he was handling the child because she, according to her statement, would tell him to stop. And as the trial court noted, what set the father off was the child crying, and, being in excruciating pain, the child would have cried even more, thus subjecting him even more to the father's ire of having his video game so rudely interrupted.

Defendant contends that there was no evidence that she would have known that what she had witnessed the father doing before, bear-hugging the baby and throwing the baby down, would cause serious harm. The People submit again that just based on the numerous fractures that this baby had, it is inconceivable that the baby would not have been in excruciating pain at a number of times in his short life, and that there would have been no exhibition of this by him. In other words, Defendant must have known something terribly wrong was happening to the baby, and that the father was the source.

ii) Second-degree murder

a) Defendant's culpability as a principal

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke,* 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice for purposes of second-degree murder is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.*, 457 Mich at 464. Accordingly, actual intent to kill or harm need not be proved, only that the defendant intentionally acted "in obvious disregard of life-endangering consequences." *Id.*, 457 Mich at 466.

What the People argued relative to why Defendant was a principal as far as the first-degree child abuse is concerned applies here. Clearly, the father's conduct was a direct cause of the child's death. But Defendant allowing the father to handle the child when she had seen with her own eyes how inappropriately he had done so was a substantial contributing factor to the child's death which made her a principal, by exposing the child to the abuse. The question is whether her conduct, her commission (allowing the father to mishandle the child when she saw with her own eyes how inappropriate his conduct was with the child, and leaving the child alone at times with the father again knowing the inappropriateness of his handling of the child) or omission (simply failing to protect the child), was in willful disregard of the natural tendency of the father's behavior to cause at least great bodily harm.

Following is the trial court's summary of what its reasoning had been in finding Defendant guilty of second-degree murder:

> From the Defendant's statements, a rational trier of fact could have concluded she committed and (sic) [an] act that caused the death of Junior: she left Junior home alone with Joshua Wilson, Sr., who then beat Junior to death.
>
> Concerning the malice element of second-degree murder, there was insufficient evidence for a trier of fact to conclude the Defendant intended to kill or intended great bodily harm to Junior by leaving him alone with Joshua White, Sr. Nevertheless, a rational trier of fact could have concluded the Defendant knew death or great bodily harm would result from leaving Junior alone with Joshua Wilson, Sr. The photographs of Junior show his body was covered with bruises, and the Defendant herself admitted she had seen Joshua Wilson, Sr. "bear hug" and throw Junior down. From this evidence, a trier of fact could have concluded that Defendant was aware Junior was the victim of ongoing physical abuse at the hands of the father and that this abuse would continue when she left him alone with his father. Furthermore, the evidence demonstrates the physical abuse was severe. Junior's hospital records and autopsy report contained lengthy descriptions of the injuries Junior had suffered. According to the autopsy report, Junior had fractures on at least five ribs, a fractured femur, a fractured tibia, fractures on both clavicles, a laceration of the small bowel, a laceration of the mesentery, a laceration of the spleen, a retinal hemorrhage, an optic nerve hemorrhage, and multiple contusions of his sternum, thorax, chest, and abdomen. Additionally, Dr. Jeffrey Jentzen, a forensic pathologist who conducted the autopsy of Junior, described Junior's injuries at length in his testimony at the preliminary examination. This description included Dr. Jentzen's opinion that bruises on Junior's body were intentionally inflicted and that Junior's fractured ribs were "classic abusive injuries" consistent with an adult squeezing his ribs. In short, the evidence introduced at trial showed Junior was subjected to severe and ongoing physical torment at the hands of his father and mother, and from that evidence, a rational trier of fact could have concluded the Defendant knew death or great bodily harm would result from leaving Junior alone with Joshua Wilson, Sr.
>
> Trial Court's Order Denying Defendant's Motion for New Trial/Motion to Vacate Convictions and Sentences, pp 6-7.

The evidence to support Defendant's conviction of first-degree child abuse was, likewise, sufficient to support her conviction, and the trial court's verdict, of second-degree murder.

Defendant repeatedly left the baby in the hands of somebody she knew was seriously physically abusing the baby. Once again, with all of his previous broken bones, the baby would have had to exhibit that he was in excruciating pain, or at the very least, extreme discomfort, and Defendant would have had to have been a witness to this. And she also would have known that the source of the baby's pain and discomfort was the father.

In addition, exculpatory statements made to law enforcement officials, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force. *People v Wackerle,* 156 Mich App 717, 720; 402 NW2d 81 (1986), quoting from *United States v McConney,* 329 F2d 467, 470 (CA 2, 1964). Here, Defendant initially gave the police a false story about how she was not even present when whatever happened to cause the baby to go limp happened. And, as the trial court noted in its findings, the father, apparently in some type of warped loyalty to Defendant, also lied and said that she had not been present:

> [THE COURT]: Initially, both Joshua Wilson and the Defendant lied to the police and told them that she had been out of the house while the majority of the abuse on December 19th was occurring and when she came back home she saw the defendant [Joshua Wilson, Sr.] strike the child and told him to stop. It is not until the Defendant is confronted by Sergeant Densmore during a subsequent interview that she admits to being present when Joshua Jr. was being beaten by his father both on December 18th and 19th.
>
> (Waiver Trial Transcript, 05/02/14, 6).

The People submit that Defendant's initial lie to the police was indicative of consciousness of guilt.

b) Defendant's culpability as an aider and abettor

If Defendant's conduct (her abject failure to protect) was not sufficient to constitute that of a principal, it certainly was adequate to support a finding that she had aided and abetted in the baby's murder. See e.g. *People v Kemp,* unpublished opinion per curiam of the Court of Appeals, decided December 2, 2014 (Docket No. 316254):[7]

> As discussed above, defendant repeatedly left the victim at the abusive hands of Hill with every reasonable expectation that doing so would result in his continuing to abuse the child and that all the while she endeavored to hide that violence from the outside world and thwart those who came to the house out of concern for her and the children. The evidentiary record thus supported the conclusion that defendant aided and abetted Hill in willful disregard of the natural tendency of Hill's behavior to cause at least great bodily harm. See *Robinson* [*People v Robinson,* 475 Mich 1; 715 NW2d 44 (2006)] 475 Mich at 6-7; *Goecke* [*People v Goecke,* 457 Mich 442; 579 NW2d 868 (1998)] 457 Mich at 463-464.[8]
>
> **Appendix B**, p 6.

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[7] The People are citing this case pursuant to MCR 7.215 (C)(1) for the reason that it sets forth succinctly the law relative to what constitutes aiding and abetting second-degree murder in the context of child abuse as no published case that the People have found does. This Opinion is attached as **Appendix B**.

[8] Of course, [a] person who aids and abets is guilty as a principal." *Mann, supra*; see also *California v Olguin,* 31 Cal App 4th 1355, 1376; 37 Cal Rptr 2d 596, 605 (1994) ("a perpetrator of an assault and an aider and abettor are equally liable for the natural and foreseeable consequences of their crime. Both the perpetrator and the aider and abettor are principals, and all principals are liable for the natural and reasonably foreseeable consequences of their crimes.").

iii) Inconsistent verdict

Although Defendant does not make a separate issue of it, Defendant notes in the body of her argument that the trial court, in finding Defendant guilty of first-degree child abuse and second-degree murder, rendered an inconsistent verdict.

The People are cognizant that a jury may render an inconsistent verdict, but a trial court, sitting as the fact finder in a bench trial, is not permitted to render an inconsistent verdict because the court " 'is not afforded the same lenience.' " *People v Ellis,* 468 Mich 25, 26; 658 NW2d 142 (2003), quoting *People v Walker,* 461 Mich 908; 603 NW2d 784 (1999). A "waiver break" occurs where a trial court, sitting as the trier of fact in a bench trial, makes findings of fact that are inconsistent with the verdict it renders. *Ellis, supra*, 468 Mich at 26-28.

The People concede that on its face, the trial court's verdict is inconsistent. But there are two reasons why Defendant should not be entitled to any relief from this Court.

First, any such error cannot be corrected on appeal. *Ellis, supra*; *Walker, supra.*

Second, Defendant's counsel, at trial, asked the trial court to consider finding Defendant guilty of second -degree murder, even if it found that Defendant was guilty of first-degree child abuse (Waiver Trial Transcript, 04/30/14, 58). A defendant cannot ask the trial court to follow a course of action, and when the court does so, complain that what the court did was improper or erroneous. Rather, when a defendant asks the trial court to follow a course of action, and the court does so, there has been a waiver of any error in the court's conduct. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000).

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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Dated: October 3, 2017

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

Supreme Court
No. 156430

KELLI MARIE WORTH-McBRIDE,

Defendant-Appellant.

Court of Appeals No. 331602
Trial Court No. 13-000575-02-FC

The People's Appendix A

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWQUANDA BOROM,

Defendant-Appellant.

UNPUBLISHED
December 19, 2013

No. 313750
Wayne Circuit Court
LC No. 12-004559-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as on leave granted the order denying her motion to quash the bindover on one count of first-degree felony murder, MCL 750.316(1)(b),[1] and two counts of first-degree child abuse, MCL 750.136b(2),[2] relating to the injuries and death of her 16 month old son. This Court initially denied defendant's application for interlocutory leave to appeal; the Michigan Supreme Court remanded as on leave granted to address the following issues:

> (1) whether a parent's failure to act to prevent harm to his or her child satisfies the requirement for a knowing or intentional act under the first-degree child abuse statute, MCL 750.136b(2), in light of MCL 750.136b(3) that separately punishes omissions and reckless conduct as second-degree child abuse; (2) if so, whether the failure to prevent a person who may be dangerous to the child to have contact with the child violates the first-degree child abuse statute; (3) whether there is a common law duty of a parent to prevent injury to his or her child; and, (4) assuming that there is such a duty under the common law, whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime. [*People v Borom*, 494 Mich 859; 830 NW2d 773 (2013).]

[1] This section was amended on June 4, 2013, but the amendment does not affect this case.

[2] The child abuse statute was amended on July 1, 2012, but the amendments do not affect this case.

We conclude that (1) a parent's failure to act to prevent harm to his or her child, with knowledge that serious physical or mental harm will result, satisfies the requirements of the first-degree child abuse statute, which does not require an affirmative act; (2) the failure to prevent a person who may be dangerous to the child from having contact with the child does not violate the first-degree child abuse statute; (3) there is a common law duty of a parent to prevent harm to his or her child; and (4) aiding and abetting first-degree child abuse may be proven where a parent breaches his or her duty to prevent injury to his or her child with knowledge that the child will be seriously harmed. We affirm the trial court's finding that the district court did not abuse its discretion in binding over defendant for trial.

I. A PARENT'S FAILURE TO ACT TO PREVENT HARM TO HIS OR HER CHILD

Defendant contends that a parent's failure to act to prevent harm to his or her child does not satisfy the requirements of the first-degree child abuse statute. We disagree.

This issue involves the interpretation of the first-degree child abuse statute, MCL 750.136b(2). "The interpretation and application of a statute presents a question of law that the appellate court reviews de novo." *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013).

> "[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes." The intent of the Legislature is expressed in the statute's plain language. When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. When interpreting a statute, the court must avoid a construction that would render part of the statute surplusage or nugatory. "Statutes must be construed to prevent absurd results." "Criminal statutes are to be strictly construed," and cannot be extended beyond the clear and obvious language. [*Id.* at 341-342 (citations omitted).]

MCL 750.136b(2) provides, in relevant part: "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." This statute requires the prosecution to show that the defendant intended to cause serious physical harm or knew that serious physical harm would be caused. See *People v Maynor*, 470 Mich 289, 295-297; 683 NW2d 565 (2004). The question is whether, by failing to act to prevent harm to his or her child, a parent can be found to have intended to cause serious physical harm or have had knowledge that serious physical harm would be caused.

Defendant argues that the Legislature did not intend for the failure to protect to be covered by the first-degree child abuse statute because the second-degree child abuse statute punishes omissions and reckless acts. The second-degree child abuse statute provides:

> A person is guilty of child abuse in the second degree if any of the following apply:
>
> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.

> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. [MCL 750.136b(3).]

"'Omission' means a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c).

Defendant's argument is inconsistent with the statutory language. The Legislature's failure to use the term "act" in the first-degree child abuse statute indicates that first-degree child abuse can be committed by an omission. MCL 750.136b(2). Contrary to MCL 750.136b(3)(b) and (c), which both require that the defendant "knowingly or intentionally commits an act," MCL 750.136b(2) requires only that the defendant "knowingly or intentionally causes serious physical or serious mental harm to a child." Thus, first-degree child abuse does not require an affirmative act and may be committed by an omission. However, in order to be guilty of first-degree child abuse by committing an omission, such as by failing to prevent harm to a child, the defendant must have intended to cause serious physical harm or have known that serious physical harm to the child would be caused. See *Maynor*, 470 Mich at 295-297.

Furthermore, the term "omission" in the second-degree child abuse statute is defined by the Legislature. An "omission" includes only a willful failure to provide food, clothing, or shelter, or a willful abandonment. MCL 750.136b(1)(c). An "omission" does not cover the failure to act to protect a child from harm. Thus, MCL 750.136b(3)(a) does not cover the failure to prevent harm to a child. The other parts of the second-degree child abuse statute also do not cover the failure to prevent harm to a child with the intent to cause serious harm or knowledge that serious harm will be caused. The second part of MCL 750.136b(3)(a) punishes reckless acts that cause serious physical or mental harm. A reckless act causing serious harm differs from knowingly and intentionally causing serious harm. MCL 750.136b(3)(b) and (c) also do not cover the conduct at issue because they punish knowingly or intentionally committing an act likely to cause serious harm and knowingly or intentionally committing an act that is cruel, but neither requires that harm resulted.

Precedent from the Michigan Supreme Court and this Court support the conclusion that the failure to prevent harm to a child, with knowledge that serious harm will result, satisfies the requirements of the first-degree child abuse statute. In *Maynor*, 470 Mich at 291-292, the defendant left her two children, ages three and 10 months, in her car for approximately three and a half hours while she visited a beauty salon. The temperature outside was in the 80s that day, and the defendant parked her car in an unshaded, asphalt parking lot. *Id.* at 291. She left one or two windows rolled down one to one and a half inches. *Id.* at 292. Both children died of heat exposure. *Id.* The defendant initially told police that she had been abducted and raped. *Id.* She later admitted that she left the children in the car, but stated that she was too stupid to know that they would die. *Id.* The Michigan Supreme Court concluded that to be guilty of first-degree child abuse, the prosecution had to prove that "by leaving her children in the car, the defendant intended to cause serious physical or mental harm to the children or that she knew that serious mental or physical harm would be caused by leaving them in the car." *Id.* at 295.

In *People v Portellos*, 298 Mich App 431, 434-435; 827 NW2d 725 (2012), the defendant was convicted of second-degree murder and first-degree child abuse relating to the death of her newborn child. In concluding that there was sufficient evidence to support the jury's verdicts, this Court stated:

> Portellos was trained in first aid, CPR, and sudden infant death syndrome. Portellos knew she was pregnant for a few weeks. She hid her pregnancy from her mother and told witnesses that she was afraid that her mother would find out about the pregnancy. Portellos read books on labor and delivery and decided to give birth to her baby at home, unassisted. Portellos had a cellular phone. Even after determining that the baby was being born breech, Portellos did not call for assistance. However, Portellos had the presence of mind to call her supervisor and coworkers to explain her absence at work. And even after the baby did not cry when she was born, but only gasped a little and did not move, Portellos still did not call for medical assistance. She instead wrapped the baby tightly in a towel. Portellos then placed the baby in a garbage bag. [*Id.* at 444-445.]

This Court concluded:

> On the basis of the facts in this case, a reasonable juror could conclude that Portellos intentionally smothered Baby Portellos so that Mary Portellos would not hear the baby cry. A reasonable juror could alternatively conclude that the baby died (1) because Portellos failed to summon medical assistance, (2) from being wrapped tightly in a towel, or (3) from being placed in the garbage bag. A reasonable juror could infer from these facts that Portellos knew that the natural and probable consequence of those actions included death or serious injury to Baby Portellos. We conclude that sufficient evidence supports Portellos's convictions of first-degree child abuse and second-degree murder because a reasonable juror could find that Portellos intentionally took actions that caused the baby's death or knowingly took those actions with a wanton disregard of the risks. [*Id.* at 445-446.]

Accordingly, this Court found that the failure to call for medical assistance, with knowledge that serious harm would result, was sufficient to satisfy the requirements of the first-degree child abuse statute. See *id.* These cases support the conclusion that the failure to act to prevent harm to a child (i.e., leaving a child in a hot car or failing to call for medical assistance), with knowledge that serious physical harm will result, satisfies the requirements of the first-degree child abuse statute.

Defendant's reliance on the Wisconsin Supreme Court's decision in *State v Rundle*, 176 Wis 2d 985; 500 NW2d 916 (Wis 1993), is misplaced. In that case, the court expressly found that the statute at issue proscribed affirmative conduct, while another subsection proscribed acts of omission. *Id.* at 997. Contrarily, Michigan's first-degree child abuse statute covers both affirmative acts and omissions.

II. FAILURE TO PREVENT A PERSON WHO MAY BE DANGEROUS TO THE CHILD FROM HAVING CONTACT WITH THE CHILD

Defendant contends that even if the failure to act to prevent harm satisfies the requirements of the first-degree child abuse statute, the failure to prevent a person who may be dangerous to the child from having contact with the child does not. We agree.

This question also involves the interpretation of the first-degree child abuse statute, MCL 750.136b(2), which we review de novo. *Lewis*, 302 Mich App at 341. As discussed above, in Issue I, *supra*, the failure to act to prevent harm to a child, with knowledge that serious physical harm will result, satisfies the requirements of the first-degree child abuse statute. The question is whether a "failure to prevent a person who may be dangerous to the child to have contact with the child" violates the first-degree child abuse statute. *Borom*, 494 Mich 859.

MCL 750.136b(2) provides, in relevant part: "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2) requires a showing that the defendant intended to cause serious physical harm or knew that serious physical harm would be caused. *Maynor*, 470 Mich at 297. As discussed, this may be satisfied by failing to act to prevent harm to a child.

Applying the plain language of the statute, see *Lewis*, 302 Mich App 341, we conclude that the failure to prevent a person who may be dangerous to the child from having contact with the child cannot constitute knowingly or intentionally causing serious harm. If a parent only knows that a person may be dangerous, then by leaving the child with that person the parent does not intend to cause serious harm or know that serious harm will result, as required to establish first-degree child abuse. See *Maynor*, 470 Mich at 297. In order to knowingly and intentionally cause serious harm, a parent must know that the person will cause serious harm to the child.

III. COMMON LAW DUTY

Defendant contends that there is a common law duty of a parent to prevent injury to his or her child, but it is limited to when the parent is aware of immediate danger to the child. We agree that there is a duty, but disagree that it is so limited.

This question involves the interpretation of common law. The scope and applicability of common law principles are questions of law, which are reviewed de novo. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

The question is "whether there is a common law duty of a parent to prevent injury to his or her child." *Borom*, 494 Mich 859. In *People v Beardsley*, 150 Mich 206, 209-210; 113 NW 1128 (1907), the Michigan Supreme Court stated:

> The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death. Although the literature upon the subject is quite meager and the cases few, nevertheless the authorities are in harmony as to the relationship which must exist between the parties to create the duty, the

> omission of which establishes legal responsibility. One authority has briefly and correctly stated the rule, which the prosecution claims should be applied to the case at bar, as follows: "If a person who sustains to another the legal relation of protector, as husband to wife, parent to child, master to seaman, etc., knowing such person to be in peril, willfully and negligently fails to make such reasonable and proper efforts to rescue him as he might have done, without jeopardizing his own life, or the lives of others, he is guilty of manslaughter at least, if by reason of his omission of duty the dependent person dies." "So one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body is bound to execute the charge with proper diligence, and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die." [Citations omitted.]

Accordingly, there is a common law duty of a parent to prevent harm to his or her child. The Michigan Supreme Court stated that the breach of the duty must be the immediate and direct cause of death in order for the parent to be liable for manslaughter. *Id.* at 209. However, there is no indication that the parent need only protect his or her child from immediate injury. In *People v Giddings*, 169 Mich App 631, 635; 426 NW2d 732 (1988), this Court found that the defendants, the parents of the child victim, had a legal duty to their child and their failure to provide nourishment caused the child's death. Thus, the duty is not limited to immediate dangers.

IV. AIDING AND ABETTING FIRST-DEGREE CHILD ABUSE

Defendant contends that under the common law duty to prevent injury to one's child, aiding and abetting cannot be proven where the defendant failed to act according to that duty, but provided no other form of assistance to the perpetrator of the crime. We disagree.

This question involves the interpretation of the aiding and abetting statute, MCL 767.39. "The interpretation and application of a statute presents a question of law that the appellate court reviews de novo." *Lewis*, 340 Mich App at 341.

The question is, assuming there is a common law duty of a parent to prevent injury to his or her child, "whether aiding and abetting under MCL 767.39 can be proven where the defendant failed to act according to a legal duty, but provided no other form of assistance to the perpetrator of the crime." *Borom*, 494 Mich 859. The elements of aiding and abetting are:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement. [*People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (citation and internal quotation marks omitted).]

Accordingly, in order to prove aiding and abetting first-degree child abuse, the prosecution must prove that (1) first-degree child abuse was committed by the defendant or some

other person; (2) the defendant performed acts or gave encouragement that assisted the commission of first-degree child abuse; and (3) the defendant intended the commission of first-degree child abuse or had knowledge that the principal intended the commission of first-degree child abuse at the time the defendant gave aid or encouragement. The second and third elements are satisfied if the defendant breaches his or her duty to prevent harm to the child by leaving the child with a person with knowledge that the person intends to commit first-degree child abuse. By leaving the child with the person, the defendant assists in the commission of the crime. If the defendant also intends or has knowledge that the person intends to commit first-degree child abuse, then the elements of aiding and abetting first-degree child abuse are satisfied.[3]

V. APPLICATION

Applying the above conclusions, we find that the trial court properly found that the district court did not abuse its discretion in binding over defendant for trial. "A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial." *People v Bennett*, 290 Mich App 465, 479; 802 NW2d 627 (2010) (citation and internal quotation marks omitted). "The purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it." *Id.* at 480 (citation and internal quotation marks omitted).

It is necessary to consider whether there was probable cause to believe defendant committed first-degree child abuse in relation to both the victim's burns and head injury. With regard to each injury, it is also necessary to determine whether there was probable cause to believe defendant was guilty as either a principal or an aider and abettor. Moreover, as discussed above, a person may be guilty of first-degree child abuse not only by intentionally causing the serious harm, but also by failing to act to prevent harm to a child, with knowledge that serious physical harm will result.

A. SECOND AND THIRD-DEGREE BURNS

With regard to the victim's second and third-degree burns, the prosecution's theories were that (a) defendant intentionally burned the victim, (b) defendant left the victim with McCullough, who intentionally burned him, or (c) defendant failed to seek medical treatment for his burns.

Assuming defendant left the victim with McCullough and he burned the victim, there is no evidence that defendant knew that McCullough would harm the victim. At that point, the victim previously suffered a fractured humerus. Even if defendant knew that the victim was previously injured while in McCullough's sole care, the victim's injured humerus was consistent

[3] Defendant contends that the child abuse statute has replaced any common law duty. However, we merely conclude that a parent's failure to prevent injury to his or her child, with knowledge that serious harm will result, which violates the common law duty, also constitutes aiding and abetting first-degree child abuse.

with an accident. Accordingly, there was not probable cause to believe that defendant committed first-degree child abuse by leaving the victim with McCullough. Nor is there probable cause to believe defendant committed first-degree child abuse as an aider and abettor by leaving the victim with McCullough. Both findings require that defendant had knowledge that McCullough would harm the victim. See *Maynor*, 470 Mich at 295-297.

With regard to the failure to seek medical treatment, there was also not probable cause to believe defendant knowingly and intentionally caused serious harm. Although she did not take the victim to the hospital, she applied ointment to the burns, as her mother, a medical professional suggested, and she scheduled a doctor's appointment for the victim. Although the medical examiner testified that a physician should have examined the victim, there was evidence that defendant believed she could treat the burns herself.

Nonetheless, there was probable cause to believe defendant was guilty of first-degree child abuse by intentionally burning the victim. There was evidence that on several occasions defendant said she was home when the victim burned himself. There was also evidence that the burns were intentionally inflicted by another individual. On the other hand, the testimony of defendant's mother, Evette Gaddes, suggested that defendant may not have been present when the burns occurred. McCullough said that defendant was not present, and defendant later stated she was not present, although it is unclear to which incident she was referring. However, given the medical examiner's testimony that the burns were intentionally inflicted by another individual and the evidence that defendant was present when they occurred, there was probable cause to believe that defendant knowingly and intentionally caused the burns herself and thus was guilty of first-degree child abuse as a principal.

B. HEAD INJURIES

With regard to the head injuries, the prosecution's theories were that (a) defendant intentionally caused the injuries, (b) defendant left the victim with McCullough, who intentionally caused the injuries, or (c) defendant prevented the victim from receiving treatment.

Assuming defendant left the victim with McCullough and he intentionally caused the head injuries, there was probable cause to find that defendant knew that McCullough would seriously harm the victim. There was evidence that, by that point, defendant knew that the victim was previously injured while in McCullough's care. Although there was evidence that the victim could turn on the hot water by himself, the victim's injuries were not consistent with a self-inflicted injury. Given the burns, the victim's humerus injury also became suspicious. Accordingly, there was evidence that defendant knew that McCullough was abusing the victim. Thus, there was probable cause to believe that defendant committed first-degree child abuse, either as a principal or aider and abettor, by leaving the child with McCullough, with knowledge that he would seriously harm the victim.

There was also probable cause to find that defendant's failure to seek medical treatment for the victim's head injury constituted first-degree child abuse. After the victim was having difficulty breathing and would not wake up, she delayed in calling 911 and lied to medical professionals about his injuries. The medical examiner testified that a layperson would recognize that the victim's slow, sporadic breathing was a problem and that the delay contributed

to the victim's condition. Given the victim's severe condition when he arrived at the hospital, there was probable cause to find that defendant knowingly and intentionally caused serious physical harm to the victim.

Finally, there was probable cause to believe defendant was guilty of first-degree child abuse by intentionally causing the head injuries. Again, defendant stated, at least once, that she was with the victim when he was injured. There was also evidence that the injuries were caused by the victim being thrown or shaken and thrown. On the other hand, Gaddes's testimony suggested that defendant may not have been present when the head injuries occurred. McCullough said that defendant was not present, and defendant later stated she was not present, although it is unclear to which incident she was referring. However, given the medical examiner's testimony that the victim was thrown, and the evidence that defendant was present when it occurred, there was probable cause to find that defendant knowingly and intentionally caused the head injuries.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court No. 156430**

KELLI MARIE WORTH-McBRIDE,

Defendant-Appellant.

Court of Appeals No. 331602
Trial Court No. 13-000575-02-FC

The People's Appendix B

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MERCEDES LAPORCHA KEMP,

Defendant-Appellant.

UNPUBLISHED
December 2, 2014

No. 316254
Ingham Circuit Court
LC No. 12-000694-FC

Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, torture, MCL 750.85, and first-degree child abuse, MCL 750.136b(2). The trial court sentenced defendant to concurrent terms of imprisonment of 25 to 50 years for the murder conviction, 15 to 30 years for the torture conviction, and seven years and 11 months to 15 years for the child-abuse conviction. Defendant appeals by right, challenging the sufficiency of the evidence. We affirm.

I. FACTS

This case arises from the death of defendant's two-year-old son as the result of multiple blunt-force injuries inflicted upon him. The prosecution's theory of the case was that defendant and her boyfriend, Marcus Hill,[1] isolated themselves and the child from friends, family, law enforcement, and others, and engaged in an escalating pattern of beatings and other excessive physical discipline out of frustrations over efforts to toilet train the child. The prosecution proceeded on the basis of alternate theories of defendant's direct participation in the violence, and of her aiding and abetting Hill in such violence.

Defendant brought her child to the hospital early in the afternoon of April 30, 2013, but he had no vital signs and abnormally low body temperature and blood sugar levels. Emergency medical providers' intensive attempts to resuscitate the boy were not successful. Defendant

[1] Hill was separately tried and convicted of first-degree murder, first-degree child abuse and torture and received a sentence of nonparolable life imprisonment for the murder conviction, concurrent with lesser sentences for the other convictions.

offered friends, family members, hospital employees, and police investigators inconsistent accounts of how she spent the several hours ahead of that hospital visit, but she consistently maintained that the victim was exclusively in Hill's care when the fatal injuries were inflicted. Defendant's demeanor as she brought her son to the hospital and attended the resuscitation efforts was described as stunned and sad, yet calm. She was not at all frantic or hysterical.

The autopsy brought to light that the child had suffered many injuries over time. External injuries included bruising on the eyes, ears, forehead, back, chest, buttocks, arms, and thighs, and abrasions on the chin and lip, all of which were consistent with applications of blunt force. One of the youngster's injuries was of a size and shape that suggested a cigarette burn. Another was damage to the skin at the base of the boy's penis, which expert testimony described as typical of abuse relating to toilet-training. Internal injuries included full thickness bleeding on the scalp, hemorrhaging into the neck, and bleeding into the lungs, and a liver broken into two or three pieces as the result of an extremely forceful blow to the abdomen. The death was classified as a homicide.

Defendant's friends and relatives testified that she became increasingly isolated from them after she began her intimate relationship with Hill in the summer of 2011. The testimony included that defendant had previously disciplined her children mainly through verbal admonishments and "time outs," only occasionally resorted to spanking by hand, but then increasingly acquiesced in and inflicted the harsher physical punishments Hill favored, including whipping the children with a belt. The testimony also included that defendant refused to open the door at various times when relatives, police officers, or workers from Child Protection Services came to her apartment to investigate or offer assistance. Defendant's intimates testified that defendant never complained to them of any abusive behavior on Hill's part.

Defendant testified that Hill began living with her late in 2011 and routinely physically abused her, and increasingly imposed restrictions on where she could go, with whom she could communicate, and who was allowed into the apartment. Of particular concern was that her children were still prone to toilet-training incidents, over which Hill was very impatient and prone to respond with excessive corporal punishment. Defendant admitted that she once tried to cause Hill to think she had struck her daughter with a belt over a toilet-training incident in order to placate him and also that Hill insisted that her son spend long periods "on the potty," and that she acquiesced in this in hopes of protecting the child from "a whooping."

Asked about April 30, 2012, defendant testified that Hill sent her out of the apartment to try to borrow a telephone charger from neighbors, once at about 7:00 that morning, then again a few hours later. According to defendant, before leaving on the second round of those errands, she checked on the children and found them still asleep. But when she returned from what was another failed attempt to obtain a charger, she instinctively felt the need to check on her son. She found him "trying to lean on the potty trying to catch his balance." Defendant continued that she asked Hill what he had done to the child, but that Hill responded with verbal and physical abuse. Defendant testified that Hill left the immediate area after a few minutes, upon which she tried unsuccessfully to give the boy water and induce him to talk. Hill, however, returned with a knife and admonished her not to leave the apartment or let anyone in.

Defendant continued that she did not run out of the house while Hill was still present because she feared he would "[k]ill all of us." Instead, she retrieved a first aid kit, looked for something in it that might be of use, and tried to administer some anti-nausea medicine which the child did not swallow. After perhaps 45 minutes, according to defendant, she sensed that Hill had left the house; she looked through the closets to make sure that he was gone, then went to a neighboring couple's home and asked for a telephone. She then accepted an offer of a ride to the hospital from one of them.

On cross-examination, defendant admitted expecting that her son would continue to have toilet-training accidents which would in turn draw continuing physical abuse from Hill, who had struck the child with a belt and inflicted injuries resulting in bruises, black eyes, and scars. She agreed that she understood Hill to be a violent man and tried to hide those violent tendencies from family, friends, CPS, and the police. She further agreed that she had allowed Hill to stay in her home even though he was not party to the lease and was deemed a trespasser by the apartment complex. Asked if she had "outright lied" to those who had come to her residence to try to offer some protection from Hill, defendant answered in the affirmative. Defendant additionally admitted that Hill was a drug dealer and chronic drug user, but that she had told no one about those things and continued to leave her children in Hill's care. Asked if she did these things on her own volition, defendant answered in the affirmative.

As cross-examination continued, defendant testified that she had bathed the victim perhaps two days before he died and had noticed marks on his arms and legs, bruises on his left arm, injuries to his back, eyes, and ears, and "like the rash mark" on the boy's penis, but then lied to a police detective who had asked about what injuries the child had before he died. Defendant added that the injuries her son had accumulated by the night before he died included a scabbed mark on the neck that might be a cigarette burn but that she did not know how he had acquired it.

Defendant further admitted that she had not taken the child to the doctor since December 2011, even though the child had sustained injuries of the sort she had just described, and defendant had no way to determine if the child were seriously hurt.

Defendant was charged with, and her jury instructed on, first-degree felony murder, first-degree child abuse, and torture. The trial court further instructed the jury on aiding and abetting in connection with all charges and on second-degree murder as an alternative to first-degree murder. As noted, the jury found defendant guilty of second-degree murder, first-degree child abuse, and torture.

II. STANDARD OF REVIEW

To ascertain if sufficient evidence supports a criminal conviction, this Court reviews de novo the trial evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

III. AIDING AND ABETTING

Although, as noted, the prosecution alleged that defendant was guilty of torture, child abuse, and murder as both a principal and as an aider and abettor, we identify the latter theory as the best-supported one, and so we will confine our analysis to it.

Regarding aiding and abetting criminal conduct, MCL 767.39 provides: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

> A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. [*People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).]

"Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). Nonetheless, any advice, aid, or encouragement, however slight, if effective, is sufficient to establish guilt on an aiding and abetting theory. *People v Washburn*, 285 Mich 119, 126; 280 NW 132 (1938). Aiding and abetting thus involves all forms of assistance rendered to the perpetrator of a crime, including all words or actions that might encourage or support the commission of the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

The intent element for purposes of aiding and abetting may be satisfied by proof that the defendant had a specific intent to commit the crime, that the defendant had knowledge of the principal's intent to commit the crime, or that the criminal act committed by the principal was an incidental consequence that might reasonably have been expected to result as a natural and probable consequence of the intended wrong. *People v Robinson*, 475 Mich 1, 6-7, 9; 715 NW2d 44 (2006). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

IV. ANALYSIS

A. TORTURE

A person commits torture when that person, "with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody." MCL 750.85(1).

In this case, the evidence is abundant that over an extended time, the victim suffered grave physical abuse, the results of which included much external bruising, internal bleeding, the fracturing of the liver, and culminating in the child's death from multiple blunt force injuries. Also evidence was presented at trial that once Marcus Hill moved in with defendant, contact with

outsiders became rare; Hill and defendant had exclusive care and custody of the victim, which excludes others as possible causes of those injuries.

Again, any amount of advice, aid, or encouragement that actually operates in furtherance of another's criminal conduct constitutes aiding and abetting. *Palmer*, 392 Mich at 378; *Washburn*, 285 Mich at 126. In this case, the evidence raises the inference that Hill was the primary abuser, but it also implicates defendant as doing more than passively observing.

The father of defendant's children testified that before associating with Hill defendant had resorted to physical discipline no greater than spanking with the hand, as opposed to "whooping" with an object, but with Hill in the household, defendant readily followed Hill's directive that she "whoop" the victim for toilet-training accidents. Defendant's close friend testified that she saw defendant calmly striking the victim's sister with a belt two or three times on Hill's orders over a toilet-training incident, and that defendant had admitted that she "did whoop" the victim's sister over another such incident. Defendant herself admitted that she once tried to protect the victim from Hill's striking her with a belt, not by objecting to such discipline, but by trying to cause Hill to think she herself had taken that action. Such conduct could only have encouraged Hill in his escalation of physical punishments.

But defendant's role in the violence Hill inflicted went beyond encouraging him through acquiescence. Defendant testified that Hill was physically violent and abusive toward her since early in their relationship and that he soon extended such treatment to the children. But rather than distance herself from Hill to protect herself and the children, she aided him in his campaign of physical abuse by allowing him to continue to reside with her despite being on her apartment complex's no-trespass list and declining offers of assistance from her mother, the police, and CPS. Defendant admitted that she understood Hill struck the victim with a belt and inflicted injuries resulting in bruises, black eyes, and scars, and also that she had expected that the boy would continue to have toilet-training accidents which would result in continuing physical abuse from Hill. She further admitted that she had noticed some serious injuries on the victim shortly before he died, but defendant stopped taking the child to the doctor and had no way to know how seriously the child was hurt. Defendant also admitted that it was her own choice to have Hill live with her and to leave her children in his care even though she fully expected Hill to continue to inflict excessive physical punishments.

This evidence would fully support a rational trier of fact's concluding that defendant was very much an aider and abettor of Hill's intentional infliction of great bodily injury or severe mental pain or suffering upon the victim, a person within his custody, with the intent to cause cruel or extreme physical or mental pain and suffering. MCL 750.85(1). Defendant's challenge to the sufficiency of the evidence to support her conviction of torture must fail.

B. FIRST-DEGREE CHILD ABUSE

First-degree child abuse occurs where a "person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). Defendant emphasizes the intent element and argues that the evidence, at best, might support a conviction of second-degree child abuse, MCL 750.136b(3).

A conviction of first-degree child abuse requires proof that the defendant intended to commit the act that resulted in harm, and in doing so "intended to cause serious physical . . . harm [to the child] . . . or that she knew that serious . . . physical harm would be caused" to the child. *People v Maynor*, 470 Mich 289, 297; 683 NW2d 565 (2004). Given that defendant was prosecuted on an aiding and abetting theory, our inquiry is whether the evidence in this case was sufficient to persuade a rational jury that defendant assisted or encouraged Hill in abusing the victim with knowledge that Hill was himself acting with the intent to cause serious physical harm or the knowledge that it would result. See *Smielewski*, 235 Mich App at 207.

Again, defendant admitted that she knew Hill was a violent abuser who inflicted excessive physical punishments, yet she chose to leave her children in his care where they were vulnerable to such violence and abuse. Defendant further admitted to noticing many signs of physical trauma on the victim's body shortly before he died and also that she had stopped taking the child to the doctor after December 2011, so she did not know if the injuries he was accumulating left him seriously hurt. The evidence thus supported the conclusion that defendant entrusted the victim to Hill with every expectation that he would continue his pattern of intentionally inflicting excessive corporal punishments on the child resulting in serious physical harm. MCL 750.136b(2); *Maynor*, 470 Mich at 296; *Smielewski*, 235 Mich App at 207. Accordingly, the evidence was sufficient to support defendant's conviction of first-degree child abuse.

C. SECOND-DEGREE MURDER

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). In attacking the sufficiency of the evidence to support her conviction of second-degree murder, defendant again focuses on the intent element.

Malice for purposes of second-degree murder is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464. Accordingly, actual intent to kill or harm need not be proved, only that the defendant intentionally acted "in obvious disregard of life-endangering consequences." *Id.* at 466.

As discussed above, defendant repeatedly left the victim at the abusive hands of Hill with every reasonable expectation that doing so would result in his continuing to abuse the child and that all the while she endeavored to hide that violence from the outside world and thwart those who came to the house out of concern for her and the children. The evidentiary record thus supported the conclusion that defendant aided and abetted Hill in willful disregard of the natural tendency of Hill's behavior to cause at least great bodily harm. See *Robinson*, 475 Mich at 6-7; *Goecke*, 457 Mich at 463-464.

Further, an actor's behavior after a crime has been committed may be indicative of that actor's intent in connection with that crime. See *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). In this case, the testimony consistently presented defendant as sad, moody, and deliberate as she brought her lifeless son to the hospital, not at all frantic or desperate. Defendant's display of sad acceptance in that tragic situation revealed that she was not surprised

that Hill's long pattern of physically abusing her child had reached its natural and probable extreme. See *Robinson*, 475 Mich at 6-7.

For these reasons, we must reject defendant's claim that the prosecution failed to present sufficient evidence to satisfy the intent element of second-degree murder.

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Deborah A. Servitto